

ORIGINAL

CLERK OF DISTRICT COURT
NORTHERN DIST. OF TX
FILED

#43637

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SEP 22 PM 1:29

DEPUTY CLERK

gkp

LEA BLOTTIN,

Plaintiff,

v.

MARY KAY INC.,

Defendant.

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§
§
§
§
§3 - 10CV1905 - M
CIVIL ACTION NO. _____

DEFENDANT'S NOTICE OF REMOVAL

Pursuant to 28 U.S.C. Sections 1332, 1441(b), and 1446, Defendant Mary Kay Inc. ("MKI") removes the action brought by Plaintiff Lea Blottin ("Plaintiff") in the 160th District Court, Dallas County, Texas, and states:

BACKGROUND FACTS

1. Plaintiff filed an Original Petition (the "Petition") on or about July 28, 2009. *See* Appendix 8-14, Exhibit B. The case is styled *Lea Blottin v. Mary Kay Inc.*, No. DC-09-09736, in the 160th District Court, Dallas County, Texas. *See* Appendix 18, Exhibit E. MKI was personally served with the Petition on September 3, 2009. *See* Appendix 16-17, Exhibit D.

2. The Petition includes a claim of retaliation and specifically mentions only one statute: the Texas Labor Code. *See* Appendix 8-14, Exhibit B. A certified copy of the entire case file of the court below, including the clerk's docket sheet, is found in the Appendix filed with this Notice of Removal and incorporated by reference herein. *See* Appendix 1-850, Exhibits A-LLLL.

3. In Plaintiff's deposition on September 14, 2010, she claimed for the first time that her retaliation claim in this litigation is based not only on supposed opposition to alleged race discrimination, but also on alleged retaliation in violation of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.* (the "FMLA"). *See* Appendix 851-872, Exhibit MMMM. Plaintiff volunteered this clarification of her retaliation claim in the following exchange:

- Q What is it that you allege [your supervisor] did that was unlawful?
A Retaliated against me.
Q For what?
A For opposing discriminatory comments that she made and reporting it, as well as demoting me after I returned from an FMLA leave.
Q Do you contend that she demoted you because you took FMLA leave?
A Yes. That is not the sole reason.
Q I want to make sure I understand the basis for your retaliation claim. You've essentially told me three things. One, for opposing what you called discriminatory remarks; two, reporting those remarks; and three, because you took FMLA leave; is that correct?
A That is correct.
Q Is there anything else that you contend forms the basis of your retaliation claim?
A Not at this point in time, no.

See Appendix 858, Exhibit MMMM at 18/4-23.

4. Additionally, during her employment, Plaintiff provided a document to MKI's human resources department stating that she had committed a "mistake" that caused her supervisor to retaliate against her. In her deposition, Plaintiff clarified that the "mistake" to which she was referring was taking FMLA leave. *See* Appendix 859-865, 871, Exhibit MMMM at 101/17-102/6, 103/15-21, 113/25-115/11, 115/12-116/12 and Dep. Ex. 24 (page 3). The deposition testimony represents Plaintiff's first allegation of FMLA retaliation in this case.

5. The day after her deposition, Plaintiff served MKI with her "Fourth Supplemental Responses to Defendant's Request for Disclosures." *See* Appendix 873-888, Exhibit NNNN. In those disclosures, Plaintiff named for the first time a witness she describes as "a former employee of MKI who has knowledge of MKI's pattern and practice of violating employees' FMLA rights and of retaliating against employees who take FMLA leave." *See* Appendix 881, Exhibit NNNN at p. 8. This was the first reference to the FMLA in Plaintiff's written discovery responses.

FEDERAL QUESTION REMOVAL

6. "If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a

copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C. §1446(b). Plaintiff’s deposition testimony and supplemental disclosures constitute Plaintiff’s assertion of an FMLA retaliation claim in this case and, as such, are the “other paper” supporting federal question removal.

7. Courts have relied on this “other paper” language in the removal statute to determine whether subject matter jurisdiction exists because of a federal question. *Eggert v. Britton*, 223 Fed. Appx. 394, 397 (5th Cir. 2007). “The Fifth Circuit has indicated that the ‘other paper’ conversion requires a *voluntary act by the plaintiff*.” *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996). While some courts relying on the “other paper” provision with respect to federal question removal have limited their use of deposition testimony to that used “to clarify the nature of the existing claim,” that is precisely what Plaintiff’s deposition testimony does. Specifically, Plaintiff voluntarily clarified that alleged FMLA retaliation forms “the basis for [her] retaliation claim.” That this was her intent is bolstered by the supplemental disclosures she voluntarily provided the day after her deposition, in which she, for the first time, named a witness whom she claims “has knowledge of MKI’s pattern and practice of violating employees’ FMLA rights and of retaliating against employees who take FMLA leave.” See Appendix 881, Exhibit NNNN at p. 8. Obviously, such supposed knowledge would be irrelevant if the basis for Plaintiff’s retaliation claim were limited to opposing racially discriminatory practices. See *O’Keefe v. State Farm Fire & Cas. Co.*, 2009 WL 95039 (S.D. Miss. Jan. 13, 2009) (holding lawsuit became removable under federal question jurisdiction when plaintiff served written discovery responses clarifying existing claim).

8. Based on the federal question raised by Plaintiff, this Court has original jurisdiction of this civil action under 28 U.S.C. § 1331. This action may be removed to this Court

pursuant to the provisions of 28 U.S.C. § 1441, in that it is a civil action arising under the laws of the United States. This Court may exercise supplemental jurisdiction over Plaintiff's state law claim pursuant to 28 U.S.C. § 1367.

OTHER MATTERS RELATED TO REMOVAL

9. Venue lies in the Northern District of Texas, Dallas Division, because Plaintiff filed her state action in this judicial district and division. *See* 28 U.S.C. § 1441(a).

10. As explained above, this Notice of Removal is filed in accordance with and within the time permitted by 28 U.S.C. § 1446(b).

11. A copy of this Notice of Removal is also being filed with the Clerk of the court in which this action was filed. Moreover, as evidenced by the attached Certificate of Service, written notice of the filing of this Notice of Removal has been provided to Plaintiff pursuant to 28 U.S.C. § 1446(d).

CONCLUSION

Based on the foregoing, MKI respectfully requests that this action, pending in the 160th District Court, Dallas County, Texas, be removed to this Court, and for any further relief to which it may be entitled.

DATED: September 22, 2010.

Respectfully submitted,

**OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.**

Ron Chapman, Jr. (by permission-LAD)

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ATTORNEYS FOR DEFENDANT MARY KAY INC.

CERTIFICATE OF SERVICE

I certify that on September 22, 2010, I served this document on Plaintiff's counsel Brian P. Sanford, Sanford Bethune, 3610 Shire Blvd., Suite 206, Richardson, Texas 75082, by sending it via First Class Certified Mail (RRR #7160 3901 9848 7468 2474).

Ron Chapman, Jr. (by permission-LAD)
Ron Chapman, Jr.

9174893.2 (OGLETREE)

ORIGINAL
CIVIL COVER SHEET

JS 44 (TXND Rev. 2/10)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
Lea Blottin**DEFENDANTS**
Mary Kay Inc.CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS**3-10CV1905-M**(b) County of Residence of First Listed Plaintiff Collin
(EXCEPT IN U.S. PLAINTIFF CASES)County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.(c) Attorney's (Firm Name, Address, and Telephone Number)
Brian P. Sanford, Sanford Bethune, 3610 Shire Blvd., Suite 206,
Richardson, TX 75082, 972.422.9777Attorneys (If Known)
Ron Chapman, Jr., Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,
8117 Preston Rd., Suite 700, Dallas, TX 75225, 214.987.3800**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input checked="" type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. ("FMLA")

Brief description of cause:

Alleged retaliation in violation of the FMLA and Texas law

VII. REQUESTED IN COMPLAINT:☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint.

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) (See instructions)**PENDING OR CLOSED: N/A

JUDGE

DOCKET NUMBER

DATE

9/22/10

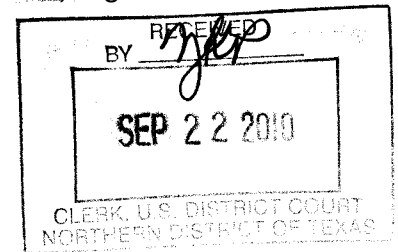
SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ORIGINAL

United States District Court
Northern District of Texas



**Supplemental Civil Cover Sheet For Cases Removed
From State Court**

This form must be attached to the Civil Cover Sheet at the time the case is filed in the U.S. District Clerk's Office. Additional sheets may be used as necessary.

1. State Court Information:

Please identify the court from which the case is being removed and specify the number assigned to the case in that court.

Court

160th Judicial District Court
Dallas County, Texas

Case Number

3 - 10CV1905 - M
DC-09-09736

2. Style of the Case:

Please include all Plaintiff(s), Defendant(s), Intervenor(s), Counterclaimant(s), Crossclaimant(s) and Third Party Claimant(s) still remaining in the case and indicate their party type. Also, please list the attorney(s) of record for each party named and include their bar number, firm name, correct mailing address, and phone number (including area code.)

Party and Party Type

Lea Blottin, Plaintiff

Mary Kay Inc., Defendant

Attorney(s)

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Texas Bar No. 17630700
Ashley E. Tremain
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Sanford Bethune
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(972) 422-9777

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Dallan F. Flake

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Page 2

Texas Bar No. 24055481
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
8117 Preston Road, Suite 700
Dallas, TX 75225
(214) 987-3800

3. Jury Demand:

Was a Jury Demand made in State Court? ☒ Yes ☐ No

If "Yes," by which party and on what date?

<u>Plaintiff</u>	<u>7/28/09</u>
Party	Date

4. Answer:

Was an Answer made in State Court? ☒ Yes ☐ No

If "Yes," by which party and on what date?

<u>Defendant</u>	<u>09/28/09 and 05/07/10</u>
Party	Date

5. Unserved Parties:

The following parties have not been served at the time this case was removed:

<u>Party</u>	<u>Reason(s) for No Service</u>
N/A	N/A

6. Nonsuited, Dismissed or Terminated Parties:

Please indicate any changes from the style on the State Court papers and the reason for that change:

<u>Party</u>	<u>Reason</u>
N/A	N/A

Supplemental Civil Cover Sheet
Page 3

7. Claims of the Parties:

The filing party submits the following summary of the remaining claims of each party in this litigation:

Party

Plaintiff

Claim(s)

Employment retaliation in violation of the
Family and Medical Leave Act and the
Texas Labor Code

9183817.1 (OGLETREE)